

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 14 OF 2010

BETWEEN

MARCO MAPOLU..... APPELLANT

AND

THE REPUBLIC..... RESPONDENT

**(Appeal from the Judgment of the High Court
of Tanzania at Mwanza)**

(Nyangarika, J.)

dated the 8th day of June, 2009

in

Criminal Appeal No. 5 of 2009

JUDGMENT OF THE COURT

15 & 17 May, 2012

KILEO, J. A.

The appellant, Marco Mapolu was charged with and convicted of rape contrary to section 130 (1) (2) and 131 (1) of the Penal Code and was sentenced to 30 years imprisonment by the District Court of Sengerema sitting at Sengerema. His appeal to the High Court was summarily rejected in terms of section 364 of the Criminal Procedure Act, CAP. 20, RE 2002 (CPA). For ease of reference we reproduce hereunder the order of summary rejection which reads thus:

"ORDER OF SUMMARY REJECTION OF APPEAL UNDER SECTION 364
OF THE CRIMINAL PROCEDURE ACT (CAP 20 RE 2002)

Nyangarika, J:

Upon perusing the record, I am satisfied in my mind that apart from Lack of Notice of intention to appeal as envisaged under Section 361 (1) (a) of Criminal Procedure Act (Cap 20 RE 2002), the appeal has been lodged without sufficient ground of complaint.

I therefore summarily reject the appeal.

K. M. Nyangarika

JUDGE."

The appellant filed in this Court a lengthy memorandum of appeal consisting of eight grounds. At the hearing he submitted a supplementary ground of appeal. Together they can conveniently be condensed into three main grounds:

- 1. That the 1st appellate judge erred in affirming the conviction while there was a variance between the charge sheet and the evidence as regards the description of the victim and the date of the commission of the crime.*

2. That the 1st appellate judge erred in upholding conviction which was based on a medical report the admission of which contravened the provisions of section 240 of the Criminal Procedure Act.

3. That the 1st appellate judge erred when he considered the appellant's silence when he was called upon to give his defense as amounting to an adverse inference against him.

The appellant appeared in person at the hearing of the appeal. He did not have much to say apart from asking the Court to adopt and consider his grounds. The respondent Republic was represented by Ms. Bibiana Kileo learned State Attorney who was assisted by Mr. Lameck Merumba, learned State Attorney.

Though supporting conviction, Ms Kileo however found the Order of the High Court summarily rejecting the appeal under section 364 of the CPA to be problematic and asked us to revise the High Court decision as there was never in the first place a competent appeal before it which would have justified the learned judge's summary rejection. The learned State Attorney argued that once the High Court had found that there was no notice of appeal given to institute the appeal, then the appellate High Court judge's

only course of action was to have struck out the incompetent appeal and leave the matter there.

We agree with the learned State Attorney that the learned High Court judge exceeded his powers by embarking on a determination, on merit, of an appeal which he had found to have been incompetent. Indeed, having found that there was no notice of appeal given as required under section 361 (1) (a) of the CPA; the learned judge should have struck out the incompetent appeal and the matter should have ended there. The summary rejection of the appeal that followed was therefore an irregularity. Under powers conferred upon us by the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 RE 2002, we cure the irregularity by quashing and setting aside the order of summary rejection of the appeal given by the High Court.

Having quashed the order for summary rejection of appeal the question that follows next is whether the learned judge was justified to have found that there was no notice of appeal given. We have noted that the learned High Court Judge acted *suo motu* without hearing the appellant when he decided that there was no notice of appeal given. We find that the

appellant was condemned unheard on this matter and we feel obliged to put this right as well. In the circumstances we quash and set aside the *exparte finding* of the High Court that there was no notice of appeal given.

We, in the event remit the matter to the High Court, to determine upon hearing both sides on whether or not the Criminal Appeal No 5 of 2009 before it is competent.

DATED at **MWANZA** this 15th Day of May 2012.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K.K.ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A handwritten signature in black ink, appearing to read "E.Y. Mkwizu", is written over a horizontal line.

E.Y. MKWIZU
DEPUTY REGISTRAR